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June 2, 2011

VIA ECF

Honorable Roslynn R. Mauskopf
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Hamel Toure, et al. v. Amerigroup Corporation, et al.
Index No.: 10-CV-5391 (RRM-ALC)

Dear Judge Mauskopf:

As counsel for Defendants in the above-referenced matter, we write pursuant to the Court's instructions at the May 25, 2011 conference regarding Defendants' application to transfer this matter to the Eastern District of Virginia, Norfolk Division ("Norfolk"). Defendants maintain that transfer remains appropriate under the factors used by courts interpreting 28 U.S.C. § 1404(a),¹ and also seek to clarify statements made during the conference regarding the availability of non-party witnesses to testify here in the Eastern District of New York in this matter. Defendants remain available to provide a full motion regarding these matters, including evidentiary submissions reflecting the below, in the Court's discretion and at its convenience.

I. Transfer of This Action Is Appropriate Under the 1404 Transfer Factors

A. Convenience of Witnesses and Parties (Factors 2 and 4)

As discussed at the conference, substantially all of Defendants' witnesses as to the classification of Marketing Representatives under the FLSA are located in Norfolk. While the two named Plaintiffs (both former employees) are located in New York, there is no guarantee or even indication that other former employees who might opt-in, or other former supervisors who might testify in this matter, reside in New York. Furthermore, as stated at the court conference, Defendants will stipulate to depose the named Plaintiffs (and opt-in plaintiffs, if any) in New York, thereby negating much of the inconvenience to them which might attach to transfer. *See*

¹ For convenience, those factors are (1) the plaintiff's choice of forum, (2) the convenience of the witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of the parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, [and] (7) the relative means of the parties. *Rindfleisch v. Gentiva Health Sys.*, 2010 U.S. Dist. LEXIS 107919 at * 11 (E.D.N.Y. Oct. 8, 2010). Additionally, some courts look to "[8] the forum's familiarity with governing law, and [9] trial efficiency and the interest of justice, based on the totality of the circumstances." *Id.* at * 12. Of these nine factors, Defendants submit that factors 2,3,4,6 and 9 strongly support transfer, and factors 5, 7 and 8 are neutral. Plaintiff's choice of forum, while entitled to some deference, cannot overcome the weight of this analysis. *Earley v. BJ's Wholesale Club, Inc.*, 2007 U.S. Dist. LEXIS 40125 (S.D.N.Y. June 4, 2007) ("plaintiffs choice of forum is a less significant consideration in a (here, putative) class action than in an individual action").



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Rindfleisch, 2010 U.S. Dist. LEXIS 107919 at *19 (“given that this lawsuit will focus on defendant’s development and implementation of the [relevant compensation] system, as well as on defendant’s formulation of its compensation practices and policies, most of the relevant witnesses will be located at [Defendant’s] headquarters”).

As Judge Bianco further observed, where an FLSA collective action “is based upon the allegation that defendant . . . has a ‘corporate policy’ of paying certain types of workers under an allegedly unlawful . . . compensation scheme . . . the testimony [that would be] more critical and extensive is likely to be provided by the parties and witnesses residing . . . where [defendant] is headquartered and its executives who set company-wide policies are based.” *Id.* at 28-29; *Pippins v. KPMG LLP*, 2011 U.S. Dist. LEXIS 30678 (S.D.N.Y. Mar. 21, 2011)(rejecting transfer away from the Southern District of New York in FLSA collective action because “the key witnesses in this case are the architects of the policy, who work in New York City”). The architects of Defendants’ policies are resident in Virginia Beach.

B. Location of Relevant Documents (Factor 3)

As stated at the conference, documents regarding Marketing Representatives’ schedules and locations (and, thus, their hours of work) are maintained in Norfolk, as are payroll records. Some of these documents are maintained in paper format, while others are electronic. Individuals responsible for maintaining and organizing these documents (the same individuals who would be called upon to review, sort and collate them in connection with this litigation), are resident in Virginia Beach. Despite (and perhaps in some cases because of) the complex electronic environment in which such information can be maintained, courts have continued to acknowledge that the great volume of paper and electronic documentation implicated by a putative class or collective action militates in favor of transfer in similar cases. *Id.* at *34-36 citing *Earley, supra* and *Lauer v. Saybolt LP*, 2010 U.S. Dist. LEXIS 48147 at *5 (E.D.N.Y. May 17, 2010).

C. Availability of Process To Compel Attendance of Witnesses (Factor 6)

As discussed below, witnesses outside of this Court’s subpoena power are unavailable for purposes of this factor of the transfer analysis, because among other things they are unavailable for trial. This means that former Human Resources and Marketing executives of Amerigroup Corporation who reside in the Norfolk area may be unavailable to testify at trial in this matter. Such individuals will be able to provide testimony regarding Defendants’ defenses including, potentially, good faith efforts to comply with the FLSA and the absence of willfulness. To the best of Defendants’ knowledge, several former Amerigroup Human Resources and Marketing professionals who participated in the review process at different time periods at issue in this case reside in the Virginia Beach area, and process would be available to compel their testimony in Norfolk. This factor “strongly” favors transfer. *Hammond v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 50293 at *19 (E.D. Cal. Apr. 29, 2011).

D. Trial Efficiency and the Interests of Justice (Factor 9)

Trial efficiency favors transfer. In 2009, the Eastern District of Virginia’s median time to trial for civil cases was 10.2 months, as opposed to 32 months in the Eastern District of



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New York. *See* Exhibit A. In the prior year, those numbers were 9.8 and 30.4, respectively. *Id.* Thus, the Eastern District of Virginia is the better-situated district for the speedy adjudication of this case.² *Hammond*, 2011 U.S. Dist. LEXIS 50293 at *22-23 (citing court's press release regarding judicial vacancy in transferor district as evidence of greater congestion, thus favoring transfer). As concerns the interests of justice, both districts have an interest in this matter: New York (where the two named Plaintiffs reside) and Virginia (where defendant Amerigroup Corporation, one of the Norfolk region's largest private employers, is headquartered).

E. Factors 5, 7 and 8 All Are Neutral In Light of Defendants' Proposed Concessions

As stated at the conference and reiterated above, Defendants will agree to depose the named Plaintiffs (and opt-in plaintiffs, if any) in New York, at mutually convenient times and locations. This stipulation negates any hardship associated with Plaintiffs' allegedly lesser means (Factor 7), rendering this factor neutral.³ Also for reasons set forth herein, the locus of operative facts factor (Factor 5) is neutral, as Plaintiffs worked in New York while key policy decisions and instructions flowed from Virginia.

Finally, as concerns forum familiarity with governing law (Factor 8), it is universally understood, as to Plaintiffs' federal claims, that the district courts "comprise a single system applying a single body of law." *H. L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962). Each court is thus equally equipped to address Plaintiffs' FLSA claims, the claims creating jurisdiction in this federal court. Further, New York courts have held that the adjudication of substantially similar New York Labor Law claims does not require any specialized expertise, deviating from the court's application of the FLSA. *Meyers et al v. Crouse Health System, Inc., et al.*, Case No. 08-CV-01221, Order dated March 28, 2011 (N.D.N.Y. March 28, 2011) at 29-30 (concluding "no novel issues of state law exist" in FLSA and Labor Law action). Thus, this Court possesses no unique knowledge regarding Plaintiffs' particular claims from which the parties stand to benefit.

II. Non-Party Witnesses Located In Virginia Could Not Be Compelled To Appear at a Trial in the Eastern District of New York

At the conference, Plaintiffs' counsel rightly noted that FRCP 45 provides a mechanism for obtaining *deposition testimony* from non-party witnesses outside a federal district. The Rule provides:

A subpoena must issue as follows:

² Furthermore, based on publicly available information, this Court is currently seeking an additional Magistrate Judge. In addition, the magistrate assigned to this case, Honorable Magistrate Judge Andrew Carter, has been nominated to serve as a District Court Judge in the Southern District of New York.

³ Defendants also note that under 28 U.S.C. § 1404, the location of a party's attorney is generally not considered. *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004); *Langford v. Ameritanz, Inc.*, 2006 U.S. Dist. LEXIS 32823, 28-29 (E.D. Cal. 2006). In any event, Plaintiffs are currently represented by three different reputable law firms.



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(A) for attendance at a hearing or trial, *from the court for the district where the hearing or trial is to be held*;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken

Fed. R. Civ. P. 45(a)(2)(emphasis added). Under part B, then, Defendants potentially could – by instituting a separate action in Virginia – seek to compel depositions in Virginia for non-party witnesses. However, neither court could “compel key non-party witnesses to attend a trial in this district.” *Collins v. Reisner*, 2010 U.S. Dist. LEXIS 118042 (E.D.N.C. Nov. 5, 2010) *citing* Fed. R. Civ. P. 45(c)(3)(A)(ii) and 15 Charles Alan Wright et al., *Federal Practice & Procedure* § 3851 (3d ed. 2007) (“Often cited as the most important factor ... is the convenience of witnesses, most particularly non-party witnesses who are important to the resolution of the case”). For these reasons, courts analyzing the availability of witnesses under this factor traditionally treat witnesses outside the subpoena range of the trial court as unavailable, and Defendants submit that the witnesses described herein should be deemed unavailable for purposes of this case. *Hammond*, 2011 U.S. Dist. LEXIS 50293 at *18-19 (granting transfer).

* * * * *

This case is not a single plaintiff action in which two individuals seek to recover modest amounts of allegedly unpaid overtime. It is a putative collective action which the authority cited herein correctly understood to constitute broad-based attack primarily focused on Defendants’ corporate policies under the laws at issue, not merely the day-to-day activities of the employee Plaintiffs. Defendants submit that this is the appropriate lens for analyzing their transfer proposal and weighing the burdens on the parties, witnesses and the courts implicated thereby. We look forward to the Court’s further direction in this regard.

Respectfully submitted,

JACKSON LEWIS LLP

A handwritten signature in cursive script that reads "Felice B. Ekelman".

FBE:dc

Felice B. Ekelman

cc: Michael J. Scimone, Esq., *Counsel for Plaintiffs* (via ECF)
Adam Klein, Esq., *Counsel for Plaintiffs* (via ECF)
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Carlos Leach, Esq., *Counsel for Plaintiffs* (via ECF)
Jonathan M. Kozak, Esq., *Jackson Lewis LLP* (internal)
Noel P. Tripp, Esq., *Jackson Lewis LLP* (internal)

EXHIBIT A

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

				12-MONTH PERIOD ENDING SEPTEMBER 30							
NEWYORK EASTERN				2009	2008	2007	2006	2005	2004	Numerical Standing	
OVERALL CASELOAD STATISTICS	Filings*			6,816	6,547	7,044	8,119	7,517	7,351	U.S.	Circuit
	Terminations			6,428	7,669	7,116	7,028	7,744	8,149		
	Pending			9,561	9,196	10,258	10,461	9,335	9,529		
	% Change in Total Filings	Over Last Year		4.1						42	4
		Over Earlier Years				-3.2	-16.1	-9.3	-7.3	51	4
Number of Judgeships				15	15	15	15	15	15		
Vacant Judgeship Months**				11.4	8.8	12.0	19.3	20.2	16.8		
ACTIONS PER JUDGESHIP	FILINGS	Total	454	436	469	541	501	490	39	3	
		Civil	380	364	383	466	423	397	26	3	
		Criminal Felony	53	45	54	48	54	65	65	4	
		Supervised Release Hearings**	21	27	32	27	24	28	55	4	
	Pending Cases			637	613	684	697	622	635	9	3
	Weighted Filings**			530	500	494	527	537	536	24	3
	Terminations			429	513	474	469	516	543	42	3
	Trials Completed			18	16	18	13	16	23	54	1
	MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	19.3	19.5	17.1	15.6	15.1	12.6	94	6
Civil**			9.5	12.6	10.8	10.5	11.6	11.2	61	4	
From Filing to Trial** (Civil Only)		32.0	30.4	34.6	29.0	30.3	33.0	62	4		
OTHER	Civil Cases Over 3 Years Old**	Number	1,255	942	752	831	763	789			
		Percentage	16.7	13.2	9.2	9.8	10.3	10.4	87	4	
	Average Number of Felony Defendants Filed Per Case			1.5	1.6	1.6	1.7	1.6	1.6		
	Jurors	Avg. Present for Jury Selection	95.51	93.02	96.13	100.24	76.22	71.01			
		Percent Not Selected or Challenged	38.5	37.0	38.5	40.6	40.3	38.4			

2009 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	5700	257	177	600	63	49	794	601	612	180	1278	19	1070
Criminal*	782	9	284	121	76	151	20	30	10	7	13	24	37

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

** See "Explanation of Selected Terms."

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

				12-MONTH PERIOD ENDING SEPTEMBER 30							
VIRGINIA EASTERN				2009	2008	2007	2006	2005	2004	Numerical Standing	
OVERALL CASELOAD STATISTICS	Filings*			4,949	4,985	5,091	5,636	5,837	6,197	U.S.	Circuit
	Terminations			4,778	5,034	4,828	5,623	6,195	5,950		
	Pending			2,846	2,761	3,038	3,059	3,077	3,507		
	% Change in Total Filings	Over Last Year		-7						66	3
		Over Earlier Years				-2.8	-12.2	-15.2	-20.1	79	7
Number of Judgeships				11	11	11	11	11	11		
Vacant Judgeship Months**				12.0	24.7	20.0	9.0	.0	4.5		
ACTIONS PER JUDGESHIP	FILINGS	Total	451	453	462	513	531	564	40	3	
		Civil	295	288	294	354	369	409	51	4	
		Criminal Felony	110	120	123	112	118	115	19	2	
		Supervised Release Hearings**	46	45	45	47	44	40	15	1	
	Pending Cases			259	251	276	278	280	319	77	6
	Weighted Filings**			463	474	474	474	518	544	42	3
	Terminations			434	458	439	511	563	541	39	3
	Trials Completed			35	32	28	34	25	31	10	3
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	5.2	5.4	5.1	5.4	5.1	5.1	6	1	
		Civil**	4.6	4.8	4.8	5.9	5.3	5.7	2	1	
	From Filing to Trial** (Civil Only)			10.2	9.8	9.0	9.3	9.4	9.2	1	1
OTHER	Civil Cases Over 3 Years Old**	Number	29	64	12	240	101	13			
		Percentage	1.7	4.1	.7	12.1	5.1	.5	7	1	
	Average Number of Felony Defendants Filed Per Case			1.2	1.2	1.2	1.3	1.3	1.3		
	Jurors	Avg. Present for Jury Selection	50.21	45.89	44.12	50.42	44.76	41.26			
		Percent Not Selected or Challenged	33.3	37.2	36.5	36.4	37.3	39.9			

2009 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

Type of	TOTAL	A	B	C	D	E	F	G	H	I	J	K	L
Civil	3240	77	212	1060	46	28	229	431	279	162	334	4	378
Criminal*	1206	14	282	277	190	200	14	87	13	44	19	22	44

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

** See "Explanation of Selected Terms."